Supreme Court, U. S.
FILED
FEB 12 1980
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1027

EDWARD J. KING,
GOVERNOR OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,
v.
PRETERM, INC., ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Motion to Dismiss or Affirm.

NANCY GERTNER,
SILVERGLATE, SHAPIRO & GERTNER,
33 Broad Street,
Boston, Massachusetts 02109.
(617) 723-2624
JOHN REINSTEIN,
Massachusetts Civil Liberties
Foundation,
47 Winter Street,
Boston, Massachusetts 02108.
(617) 482-3170
BARBARA SARD,
Greater Boston Legal Services,
466 Blue Hill Avenue,
Roxbury, Massachusetts 02121.
(617) 442-0211

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents.

Questions presented 2

Statement of the case 2

Argument 7

I. The appeal should be dismissed for lack of jurisdiction because it was not taken within the time prescribed by law as required by Rule 11 7

II. The decision of the court of appeals with respect to the scope of Title XIX is both carefully reasoned and in all respects consistent with the decisions of the overwhelming majority of district courts and courts of appeals that have considered this issue, and with dicta of this court 9

III. The court's order enjoining the defendants from enforcing the challenged statutes to the extent more restrictive than the Hyde Amendment is consistent with previous decisions of this Court and the requirements of Massachusetts law 11

Conclusion 13

Table of Authorities Cited.

CASES.

Beal v. Doe, 432 U.S. 438 (1977) 10

Charger Investments, Inc. v. Corbett, 429 U.S. 877 (1976) 7

Coe v. Dirkswager, No. 3-79 Civ. 56 (D. Minn. August 9, 1979) 10

D. . . R. . . v. Mitchell, No. 78-1675 (10th Cir. October 25, 1979) 11
Doe v. Busbee, No. C79-786A (N.D. Ga. December 13, 1979) 10
Doe v. Percy, 476 F. Supp. 324 (D. Wis. 1979) 10
Emma G. v. Edwards, No. 77-1342 (E.D. La. November 27, 1978) 10, 11
Federal Trade Commission v. Colgate Palmolive, 380 U.S. 374 (1965) 9n
Federal Trade Commission v. Minneapolis Honeywell Co., 344 U.S. 206 (1952) 8
Gabriel v. United States, 429 U.S. 877 (1976) 7
Hodgson v. Board of County Commissioners, No. 79-1665 (8th Cir. January 9, 1980) 11
Jaffe v. Sharp, 463 F. Supp. 222 (D. Mass. 1978) 3
Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529 (D. Ohio 1979) 11
Preterm, Inc. v. Dukakis, 591 F. 2d 121 (1st Cir. 1979) 3, 5, 8, 9, 12
Quern v. Mandley, 436 U.S. 725 (1978) 12
Reproductive Health Services v. Freeman, Nos. 79-1275, 79-1346 (8th Cir. January 9, 1980) 11
Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978) 11
Rosado v. Wyman, 397 U.S. 397 (1970) 12n
Rush v. Parham, 440 F. Supp. 383 (N.D. Ga. 1977) 10
Slaker v. O'Connor, 278 U.S. 188 (1929) 9n
Smith v. Ginsberg, No. 75-0380C4 (S.D. W. Va. 1978) 11
Taggart v. New York, 392 U.S. 667 (1967) 7
Territo v. New York, 358 U.S. 279 (1959) 7
United States v. Adams, 383 U.S. 39 (1966) 9n

White v. Beal, 555 F. 2d 1146 (3d Cir. 1977) 10
Zbaraz v. Quern, 596 F. 2d 196 (7th Cir. 1979) 11

STATUTES AND REGULATIONS.

28 U.S.C.
§ 1254(2) 5
§ 2101(c) 7
Social Security Act, Title XIX, 42 U.S.C. §§ 1396 et seq. 3, 4, 7, 9, 10, 12
§ 1396a(a)(10) 10
§ 1396a(a)(13) 11n
§ 1396a(a)(13)(c) 10
§ 1396a(a)(17) 10
§ 1396a(a)(19) 10
1960 Kerr-Mills Amendments to Social Security Act, Title I, 74 Stat. 924 11n
Hyde Amendment, P.L. 95-205, § 209, 91 Stat. 1460 3n, 4, 11
42 C.F.R. § 442.10(a)(5)(i) 10
G. L. c. 118E, §§ 1, 6 12
Mass. St. 1978, c. 367 3n
Mass. St. 1979, c. 268, § 1 5
Mass. St. 1979, c. 393, § 2, Item 4402-5000 5

MISCELLANEOUS.

Federal Rules of Appellate Procedure, Rule 8 3
Report of the Committee on Finance of the U.S. Senate, Rept. 404, Part 1, June 30, 1965 11n

Report of House Committee on Ways and Means on H.R. 6075, H. Rep. 213, March 29, 1965 — 11n

Rules of the Supreme Court of the United States
- Rule 11 — 2, 7
- Rule 16 — 1
- Rule 16(1) — 7n

In the Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1027.

EDWARD J. KING,
GOVERNOR OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,

v.

PRETERM, INC., ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Motion to Dismiss or Affirm.

Pursuant to Rule 16 of the Rules of this Court, Preterm, Inc., Stanton P. Goldstein, M.D., Shiao-Yu Lee, M.D., Jane Doe, Jane Doe II, Massachusetts Welfare Recipients for Welfare Reform, and the Planned Parenthood League of Massachusetts move that the appeal by the Governor of the Commonwealth of Massachusetts, its Secretary of Administration

and Finance, its Secretary of Human Services, and its Commissioner of Public Welfare be dismissed. In the alternative, appellees move that the judgment of the United States Court of Appeals for the First Circuit be affirmed.

Questions Presented.

1. Whether this appeal should be dismissed for lack of jurisdiction because it was not taken within the time prescribed by law as required by Rule 11.

2. Whether the questions presented by this appeal are substantial where the Court of Appeals decision was carefully reasoned and consistent with all prior decisional law on both the appellate and district court levels construing the Social Security Act in general and the significance of identical restrictions on Medicaid funding of abortions in particular.

Statement of the Case.

The defendants-appellants (hereinafter "defendants"), public officials of the Commonwealth of Massachusetts, seek to appeal from a "series of orders" entered "at various times" by the United States Court of Appeals for the First Circuit (Jurisdictional Statement, p. 3). The first order is an injunction pending appeal entered by the court of appeals in August, 1978. The second is the judgment and order of the court of appeals entered January 15, 1979, affirming the decision of the district court. The third is an order entered by the court on August 2, 1979, amending the language of its prior orders to include a later enacted statute which continued the restrictions previously enjoined by the court.

On July 13, 1978, the plaintiffs brought this action in the United States District Court for the District of Massachusetts challenging a Massachusetts law restricting the expenditure of public funds to pay for abortions under its Medicaid program. The complaint alleged that the restriction, which was contained in a rider to the 1978 Medicaid appropriation, was invalid under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, and the United States Constitution. Plaintiffs moved for a preliminary injunction requiring the defendants to pay for abortions which had been determined by a physician to be medically necessary. On July 28, 1978, the district court entered an order granting in part and denying in part plaintiffs' request for preliminary relief (decision reported *sub nom. Jaffe* v. *Sharp*, 463 F. Supp. 222 (D. Mass. 1978)). The plaintiffs promptly appealed and moved, pursuant to Rule 8, F. R. A. P., for an injunction pending appeal in the United States Court of Appeals for the First Circuit.

On August 7, 1978, two judges of the court of appeals entered an order granting the temporary relief requested by the plaintiffs pending appeal, enlarging the scope of the injunction that had been entered by the district court.[1] The defendants took no appeal at that time.

On January 15, 1979, the court of appeals affirmed the district court's ruling on the plaintiffs' statutory claims and remanded the case to the lower court for consideration of the constitutional claims. *Preterm, Inc.* v. *Dukakis*, 591 F. 2d

[1] The district court had found that c. 367 violated the requirements of Title XIX by failing to provide for medically necessary abortions, but declined to order the defendants to pay for Medicaid abortions other than those for which federal reimbursement would be available under the provisions of the Hyde Amendment. The court of appeals entered an order modifying the order of the district court to require the defendants to provide funding for all medically necessary abortions (pending the disposition of the appeal).

121 (1st Cir. 1979).[2] The members of the panel unanimously concluded that the Massachusetts law restricting the expenditure of state funds for abortion was inconsistent with the requirements of Title XIX. (It is this part of the court's ruling which the defendants attack in this appeal). Two judges, however, agreed with the district court that the Hyde Amendment, P.L. 95-205, § 209, 91 Stat. 1460, had modified the substantive requirements of the Medicaid statute. The plaintiffs' motion for rehearing was denied by the court on February 2, 1979. The mandate was stayed, however, to permit the plaintiffs to file a petition for a writ of certiorari, and the injunction entered August 7, 1978, was specifically continued in force.

The plaintiffs timely filed a petition for a writ of certiorari in this Court, seeking review of the second part of the ruling of the court of appeals.[3] The defendants did not appeal from that decision within the time allowed by law.

On May 14, 1979, certiorari was denied. On the following day, the plaintiffs filed an application for suspension of the order denying certiorari pending the filing and disposition of a petition for rehearing. On May 18, 1979, the Circuit Justice granted the motion, and on June 18, 1979, a petition for rehearing was timely filed.

While the petition for rehearing was pending before this Court, the Massachusetts legislature enacted two additional

[2] While the appeal was pending before the court of appeals, the defendants, with the assent of the plaintiffs, filed a motion seeking consolidation of the preliminary injunction hearing with the hearing on the merits, which motion was granted on September 6, 1978.

[3] The basis for the defendants' opposition to the granting of certiorari is telling: they objected to certiorari on the grounds that the court of appeals' decision did not fully dispose of all issues, since it concerned only the statutory claims and not the constitutional issues (which were remanded to the district court).

restrictions on funding for abortions under the state's medical assistance program. The first was an amendment of the General Laws permanently prohibiting the use of state funds to pay for an abortion which is not necessary to prevent the death of the mother. Mass. St. 1979, c. 268, § 1. The second was a rider to the fiscal 1980 Medicaid appropriation which continued, and even expanded, the restrictions on abortion funding which had been adopted the previous year, and invalidated by the court of appeals. Mass. St. 1979, c. 393, § 2, Item 4402-5000. After the plaintiffs unsuccessfully sought assurances from the defendants that the new restrictions would not be implemented, they filed a motion in the court of appeals seeking a clarification, or, in the alternative, a technical modification of the court's August 7, 1978, order making explicit its applicability to the 1979 legislation.[4]

On August 2, 1979, the court of appeals entered a technical order, which substituted the title of the 1979 appropriations rider for the title of the 1978 appropriations rider in its previous orders. Noting that the defendants had conceded in their submission to the court of appeals that the 1979 appropriations rider conflicted with the court's judgment in *Preterm, Inc.* v. *Dukakis* and with the August 7, 1978, injunction, the court of appeals "found no reason not to add to its mandate" the 1979 appropriations rider. The court declined, however, to include Mass. St. 1979, c. 268, § 1, which was not yet in force, within its order at that time.

On August 20, 1979, over seven months after the judgment of the court of appeals, the defendants filed a notice of appeal purporting to appeal under 28 U.S.C. § 1254(2) from the August, 1978, injunction, the January 15, 1979, judgment affirm-

[4] The plaintiffs were compelled to seek interlocutory relief in the court of appeals for the simple reason that the case was currently before that court and its injunction remained in full force and effect pending final action on the petition for rehearing by this Court.

ing the decision of the district court and the August, 1979, modification of the previous orders.

On October 1, 1979, this Court denied the plaintiffs' petition for rehearing of the denial of their petition for a writ of certiorari.

On October 3, 1979, the defendants sought an order in this Court extending the time for docketing their appeal until ninety days after the final disposition of the unresolved claims in the district court or, in the alternative, until December 28, 1979.[5] On October 16, 1979, the Circuit Justice entered an order extending the time for docketing the appeal until December 30, 1979.

The plaintiffs now move the Court to dismiss the appeal as an untimely attempt to obtain review of the January 15, 1979, judgment of the court of appeals. Alternatively, they move the Court to affirm the judgment of the court of appeals on the ground that it is clearly correct.

[5] There were two grounds for the request: one a misapprehension that the plaintiffs' petition was still pending, and the other, the defendants' desire to have all claims — statutory and constitutional — reviewed at the same time, a position which plaintiffs now share:

> Having filed their notice in order to protect their right to appellate review eventually in this Court, respondents continue to maintain that this Court's consideration of this case should await the District Court's final disposition of the petitioner's constitutional claims. . . . For this reason respondents continue to oppose the petition for certiorari which the full Court denied on May 14, 1979, and petitioner's motion for rehearing (which awaits disposition). *Motion for Order Permitting Postponement of Further Appellate Proceedings.*

Argument.

I. The Appeal Should be Dismissed for Lack of Jurisdiction Because it was Not Taken Within the Time Prescribed by Law as Required by Rule 11.

On its face, the appeal from the January 15, 1979, judgment and order of the court of appeals affirming the decision of the district court is plainly untimely. 28 U.S.C. § 2101(c) requires that the appeal be taken within ninety days of the entry of the judgment or decree. The time for filing a notice of appeal is absolute and may not be enlarged. *Territo* v. *New York*, 358 U.S. 279 (1959); *Taggart* v. *New York*, 392 U.S. 667 (1967); *Charger Investments, Inc.* v. *Corbett*, 429 U.S. 877 (1976); *Gabriel* v. *United States*, 429 U.S. 877 (1976). Here, the order affirming the decision of the district court was entered on January 15, 1979, and the petition for rehearing was denied on February 2, 1979, but it was not until August 20, 1979, that the defendants filed their notice of appeal.[6]

While the appeal from the August 2, 1979, order amending the order of August 7, 1978, and the judgment of January 15, 1979, may have been timely, this appeal is not concerned with that order. The issues noted by the defendants in their jurisdictional statement are those decided in the January 15, 1979, judgment of the court of appeals — whether the court of appeals was correct in ruling on that date that the Commonwealth's limitation on Medicaid abortions was consistent with Title XIX and whether the remedy ordered at that time was proper.

[6] This conclusion is unaffected by the Court's order enlarging time for docketing the appeal. For, while there may be no enlargement of time for the taking of an appeal, pursuant to Rule 11 and § 2101(c), there may be an enlargement of time to docket the appeal (and file the jurisdictional statement) under Rule 16(1).

The August 2, 1979, order on the contrary, concerned purely technical matters. It was entered pursuant to the plaintiffs' request for clarification. It simply added to the court's previous orders the newly enacted statute. Even the defendants conceded that there was no question that the new enactment conflicted with the court's judgment in *Preterm, Inc.* v. *Dukakis*.

A nonsubstantive amendment cannot revive a dormant appeal. In *Federal Trade Commission* v. *Minneapolis Honeywell Co.*, 344 U.S. 206 (1952), the FTC failed to petition for certiorari from an entry of judgment by the court of appeals dismissing count III of the FTC complaint. Instead, the Commission submitted a memorandum asking that counts I and II of its cross petition, which had not been challenged on the appeal, be sustained. The court then issued an order, labelled "Final Decree," dismissing count III (as it had done in the first order) and affirming counts I and II. It was only after the second order that the FTC petitioned for certiorari on the issue of the dismissal of count III. The Court ruled the petition untimely:

> [T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance or resolves a genuine ambiguity in a judgment previously rendered should the period within which an appeal must be taken . . . begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality. 344 U.S. at 248-49.[7]

[7] The case law has articulated what constitutes "matters of substance" or the circumstances under which there is a "genuine ambiguity" but have not affected the underlying rule. *See Federal Trade Commission* v. *Colgate Palmolive*, 380 U.S. 374 (1965) (second mandate in fact clarified a genuine ambiguity in the *reasoning* of the first decision); *United States* v. *Adams*, 383 U.S. 39 (1966) (second decision dealt with a *discrete*, separate issue, not raised in the first).

In the instant case, the defendants, by admitting that the 1979 enactment conflicted with the court of appeals' prior judgment, have also conceded that the August 2, 1979, order did not "disturb" or "revise" any "legal rights and obligations" already settled by the decision in *Preterm, Inc.* v. *Dukakis*. It simply extended the settled "legal rights and obligations" to a subsequent condition, a new enactment. Plainly, if the state chooses to implement a law which it knows to be invalid it cannot benefit from the fact to revive a previously extinguished claim. In any case, the issues which the defendants seek to review were not affected by the August 2, 1979, amendment. They concern the obligations set up by the January 15, 1979, judgment and the August 7, 1978, order.[8]

II. The Decision of the Court of Appeals with Respect to the Scope of Title XIX is Both Carefully Reasoned and in All Respects Consistent with the Decisions of the Overwhelming Majority of District Courts and Courts of Appeals that have Considered this Issue, and with Dicta of this Court.

The members of the panel of the First Circuit unanimously concluded that the Massachusetts law restricting the expend-

[8] It should also be noted that the August 2, 1979, order is not a final order within the meaning of *Slaker* v. *O'Connor*, 278 U.S. 188 (1929). The policies underlying the final judgment rule — to avoid piecemeal appeals — would not be met if this appeal were allowed to stand. One small portion of the plaintffs' statutory claim (the remainder of which had been covered by plaintiffs' petition for a writ of certiorari) would be before this Court. Significant constitutional claims are still pending before the district court. It is plain from all of the submissions of the defendants that even they did not intend this result.

iture of state funds for abortions was inconsistent with the requirements of Title XIX. Contrary to the defendants' assertions, that finding was based upon a careful analysis of the language of the statute, its supporting regulations, the prior decisional law construing the requirements of Title XIX, and, most strikingly, the decisions of the vast majority of district courts and courts of appeals that have considered this precise issue.

The court found that abortions generally fit within the mandatory items which the state must provide under 42 U.S.C. § 1396a(a)(13)(c). Medically necessary abortions cannot be carved out of the required services since to do so would violate certain specific statutory and administrative standards and an extensive case law. Restricting funding to abortions necessary to save the life of the woman (and thereby excluding medically necessary abortions) cannot be justified in terms of the goals of the statute (42 U.S.C. § 1396a(a)(17)), the best interests of the recipients (42 U.S.C. § 1396a(a)(19)), or the requirement that services be equally distributed (42 U.S.C. § 1396a(a)(10)). It cannot be justified in terms of medical necessity (42 C.F.R. § 442.10(a)(5)(i)). It is plainly a prohibited exclusion based on "diagnosis, type of illness or condition" (42 C.F.R. § 442.10(a)(5)(i)).

Moreover, such an exclusion is inconsistent with the holdings of cases construing Title XIX, notably *Rush* v. *Parham*, 440 F. Supp. 383 (N.D. Ga. 1977), *White* v. *Beal*, 555 F. 2d 1146 (3d Cir. 1977), and with dicta in this Court's decision in *Beal* v. *Doe*, 432 U.S. 438, 440 n.1 (1977). Finally, the Court's holding — that the Massachusetts restriction violates the terms of Title XIX — is consistent with the decisions of nine other courts — on all levels, throughout the country. *Coe* v. *Dirkswager*, No. 3-79 Civ. 56 (D. Minn. August 9, 1979); *Doe* v. *Busbee*, No. C79-786A (N.D. Ga. December 13, 1979); *Doe* v. *Percy*, 476 F. Supp. 324 (D. Wis. 1979); *Emma G.* v.

Edwards, No. 77-1342 (E.D. La. November 27, 1978); *Hodgson* v. *Board of County Commissioners*, No. 79-1665 (8th Cir. January 9, 1980); *Planned Parenthood Affiliates of Ohio* v. *Rhodes*, 477 F. Supp. 529 (D. Ohio 1979); *Reproductive Health Services* v. *Freeman*, Nos. 79-1275, 79-1346 (8th Cir. January 9, 1980); *Roe* v. *Casey*, 464 F. Supp. 487 (E.D. Pa. 1978); *Smith* v. *Ginsberg*, No. 75-0380C4 (S.D. W. Va. 1978); *Zbaraz* v. *Quern*, 596 F. 2d 196 (7th Cir. 1979); *cf. D . . . R . . .* v. *Mitchell*, No. 78-1675 (10th Cir. October 25, 1979).[9]

III. The Court's Order Enjoining the Defendants from Enforcing the Challenged Statutes to the Extent More Restrictive than the Hyde Amendment is Consistent with Previous Decisions of this Court and the Requirements of Massachusetts Law.

According to the defendants, rather than enjoining the application of the challenged statute insofar as it was inconsistent with the Hyde Amendment, the court of appeals should have remanded to give the state an opportunity to choose between amending the state law provisions in conformity with the

---

[9] The defendants' reliance on the 1960 Kerr-Mills amendments to Title I of the Social Security Act, 74 Stat. 924, is wholly misplaced. The statute at issue here is the 1965 Act which was specifically enacted to cure the deficiencies of Kerr-Mills. One key goal of the 1965 Act was to improve the quality and scope of medical care for the needy by establishing for the first time minimum requirements on the scope of services provided by the states. Under Kerr-Mills, participating states had only to provide "some institutional and noninstitutional care," rather than the five mandatory services of 42 U.S.C. § 1396a(a)(13). The legislative history of the 1965 statute addresses itself particularly to these inadequacies and efforts to provide minimum mandatory federal requirements. Report of House Committee on Ways and Means on H.R. 6075, H. Rep. 213, March 29, 1965, p. 9; Report of the Committee on Finance of the U.S. Senate, Rept. 404, Part 1, June 30, 1965, pp. 9, 80.

federal law, or opting out of the federal program. The argument is without merit. As the court noted, although the state's participation may be voluntary, once it chooses to participate it must do so consistent with the requirements imposed by the Medicaid Act. *Preterm, Inc.* v. *Dukakis*, 591 F. 2d 121, 124 (1st Cir. 1979). The responsibility of the court is to define the federal requirements and order compliance therewith. If the state chooses to withdraw, that option is always available to it. *Quern* v. *Mandley*, 436 U.S. 725 (1978).[10]

In any event, Massachusetts state law requires a Medicaid program and requires that the state harmonize its provisions with Title XIX. G. L. c. 118E, §§ 1 and 6. Requiring the court to remand to give the defendants an opportunity to opt out of this program, would have been pointless in view of their obligations under state law.

[10] The defendants' reliance on *Rosado* v. *Wyman*, 397 U.S. 397 (1970), is misplaced, since what was at issue in *Rosado* was the method of computing welfare benefits because the incremental cost to the state was potentially massive, and because there was no "discrete and severable" provision whose enforcement could be enjoined. 397 U.S. at 421. There is no such problem in the instant case.

Conclusion.

For the reasons stated above, the plaintiffs request that the Court dismiss the instant appeal, or, in the alternative, affirm the decision of the Court of Appeals for the First Circuit.

Respectfully submitted,

NANCY GERTNER,
SILVERGLATE, SHAPIRO
& GERTNER,
33 Broad Street,
Boston, Massachusetts 02109.
(617) 723-2624

JOHN REINSTEIN,
Massachusetts Civil Liberties
Union Foundation,
47 Winter Street,
Boston, Massachusetts 02108.
(617) 482-3170

BARBARA SARD,
Greater Boston Legal Services,
466 Blue Hill Avenue,
Roxbury, Massachusetts 02121.
(617) 442-0211